Supreme Court, U.S.
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No. 99-1978

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Justice of this Court who earlier disqualified himself or herself from this case may now rescind that disqualification in order to participate in the Court's deliberations.

2. Whether Article III, Section 1 of the Constitution of the United States permits Congress to impose, through a new tax, a discriminatory economic burden on sitting Article III judges.

3. Whether a diminution in the compensation of a limited class of Article III judges in violation of Article III, Section 1 of the Constitution of the United States is remedied by a subsequent increase in the salaries of a wider class of federal employees that was granted for purposes other than to remedy the unconstitutional diminution.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

The additional statutory provisions involved in this case, Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, 97 Stat. 1105 (1983), Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494, 1059-60 (1984), and Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986), are set forth in the Appendix to this brief. The Appendix also sets forth 28 U.S.C. § 455 and 28 U.S.C. § 2109.

COUNTER-STATEMENT OF THE CASE

The Constitution of the United States provides that the compensation of Article III judges "shall not be diminished during their continuance in office." U.S. CONST. art. III, § 1. This provision "is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). For this reason, "there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation. . . . " *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933).

Recognizing this duty, a group of sixteen Article III judges brought this action against the United States of America. The judges claimed that the United States diminished their compensation in violation of Article III of the Constitution by enactment of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Equity Act"), Pub. L. No. 97-248, 96 Stat. 324, the Social Security Amendments of 1983 ("1983 Amendments"), Pub. L. No. 98-21, 97 Stat. 65, and related statutes (collectively, "Social Security Amendments").

This case is now in its eleventh year of litigation. In 1996, this Court entered an order affirming the Federal Circuit's judgment that the enactment of the statutes at issue unconstitutionally diminished the compensation of sitting Article III judges. Since that time, the plaintiff judges, as well as other affected individuals and entities, have relied on the Court's order as a final determination of the liability question. On remand, the only remaining issue was the quantum of damages owed to the judges. While the government continued to claim that the judges were entitled to no (or minimal) damages, the *en banc* Federal Circuit unanimously disagreed. The government now asks this Court to grant certiorari, principally on the ground that the Court should reconsider its 1996 affirmance of the Federal Circuit's judgment on the liability question.

1. In the early 1980s, Congress became concerned about the integrity of the Social Security system. The National Commission on Social Security Reform ("Greenspan Commission") was established by Congress to study this problem and make recommendations about how to strengthen the system. *See* Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (Dec. 18, 1981). At the time, over 90 percent of the 2.7 million federal civilian employees in the United States, including federal judges, did *not* participate in the Social Security system.[1] The Greenspan Commission recommended that "all *newly hired* civilian employees of the Federal Government" should be added to Social Security

[1] *See* Joint Stipulations ("Jt. Stip.") ¶ 19, Joint Appendix before the United States Court of Appeals for the Federal Circuit filed January 11, 1995 ("J.A.") at 96.

to strengthen the program.[2] Congress accepted this recommendation, and the 1983 Amendments provided that federal civilian employees hired *after* December 31, 1983, would be subject to Old Age and Survivors Disability Insurance ("OASDI") withholding.

Under the 1983 Amendments, the vast majority of the federal civilian employees hired before 1984 remained exempt from OASDI withholding. The 1983 Amendments did, however, extend OASDI withholding to a small group of federal civilian employees that were elected, appointed or hired *before* January 1, 1984. Congress imposed immediate coverage on the President and Vice President, certain senior political appointees, members of Congress, certain legislative branch employees not already covered by the Civil Service Retirement System ("CSRS"), and sitting federal judges.[3] With the exception of federal judges, the group added under the 1983 Amendments consisted of political appointees or elected officials of the legislative and executive branches. In sum, less than one-half of one percent of the federal civilian workforce (or less than 12,500 employees) were mandatorily added to OASDI coverage as a result of the 1983 Amendments. Lynn Decl. ¶ 42(b), J.A. at 120-21.[4]

2. At the time each judge in this case was appointed to the bench, their judicial salaries were *not* subject to withholding for Social Security coverage. *See* 42 U.S.C.

[2] Report of the National Commission on Social Security Reform at 2-7 (1983) ("Commission Report") (emphasis added).

[3] 42 U.S.C. § 410(a)(5)(C)-(G); *see generally* Jt. Stip. ¶ 29 & attached material, J.A. at 98, 104-06.

[4] The history of the Social Security Amendments, and a careful analysis of the operation and effect of these statutes, is contained in the declaration of respondents' expert Peter R. Lynn, which was submitted by the judges in support of their motion for summary judgment. J.A. at 107-30.

§ 410(a)(6)(A) (1980). Rather, Article III judges were (and remain) subject to special statutory retirement provisions that reflect their lifetime tenure. After meeting certain age and service requirements, an Article III judge may retire from active service (*i.e.*, assume senior status), but render service as he is able. In this event, the judge retains the salary of the office, including increases. 28 U.S.C. § 371(b). Alternatively, an Article III judge may retire from office and receive an annuity for the remainder of his lifetime equal to the judicial salary at the time of his retirement. 28 U.S.C. § 371(a). In addition, Article III judges have the option of contributing to the Judicial Survivors' Annuity Fund to provide for their survivors. 28 U.S.C. § 376.

Each judge in this case was appointed to his or her office by the President before January 1, 1983, the date on which Article III judges first became subject to the HI portion of Social Security withholding imposed by the Tax Equity Act. On January 1, 1984, judges first became subject to the OASDI portion of Social Security withholding imposed by the 1983 Amendments. *See* 42 U.S.C. § 410(a)(5), (p). Thus, in making the decision to accept a federal judicial appointment, each of the judges understood he would receive the statutory judicial income, calculated without deductions for Social Security. *See* Declarations of Judges, J.A. at 26-90. In addition, several took special note of, and relied specifically on, the savings that would result from the provision of statutory retirement benefits without Social Security deductions.[5]

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[5] *See, e.g.*, A.J. McNamara Decl. ¶ 3, J A. at 45-46 (considered absence of Social Security deduction from judicial salary in calculating his ability to pay for college education of four children); Henry A. Mentz, Jr. Decl. ¶ 3, J.A. at 72-73 (absence of Social Security deduction from judicial salary was a factor making judicial appointment attractive); Michael M. Mihm Decl. ¶ 3, J.A. at 79-80 (considered absence of Social Security deduction important in light of career in public service and family obligations).

3. Congress recognized that the effect of the 1983 Amendments would be to subject federal civilian employees hired after January 1, 1984, to mandatory withholding for two different retirement programs (*i.e.*, Social Security and CSRS). In order to give these employees relief from dual withholding until a new federal retirement system could be created, Congress enacted the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 ("Adjustment Act"), Pub. L. No. 98-168, 97 Stat. 1106 (1983). Under the Adjustment Act, the total amount deducted from a new employee's salary was no greater than the amount withheld from an existing CSRS employee earning the same salary, even though the new employee was subject to both CSRS and Social Security. These new employees would eventually become subject to a new government retirement system that had yet to be developed, and would receive credit under that system for their interim service under CSRS. Adjustment Act § 207, 97 Stat. at 1111, 5 U.S.C. § 8331 note, at 995-96.

The Adjustment Act also included special provisions for the group of existing elected officials and appointees mandatorily added to Social Security on January 1, 1984. Congress recognized that "the rules [were] being changed in the middle of the game" for this group and provided them with choices to harmonize their deductions for retirement programs. H.R. Conf. Rep. No. 98-542, at 13 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1625, 1628. The Conference Report on the Adjustment Act states:

> Unlike newly hired employees who may elect whether or not to accept Government employment and face the uncertainties of a yet-to-be-established supplemental retirement program, *the affected group has no election other than to resign* (which in many instances would involve resignations from elected offices, *lifetime judicial appointments*, or presidentially appointed and Senate-confirmed positions).

Id. (emphases added).

In order to "mitigate th[is] unfairness," *id.*, the Adjustment Act allowed most of those mandatorily added on January 1, 1984, to choose from three options: (1) to discontinue participation in the covered retirement system (usually CSRS) and receive a refund of previous contributions (resulting in Social Security coverage only); (2) to participate fully in both the covered retirement system and Social Security; or (3) to participate in both systems subject to the Adjustment Act interim "offsets" applicable to new employees, which would leave their total deductions unchanged. Adjustment Act § 208, 97 Stat. at 1111-12, 5 U.S.C. § 8331 note, at 997.

While the provisions of the Adjustment Act would appear to encompass Article III judges, in actuality they do not. Neither the retirement provisions of the Judicial Code nor the Judicial Survivors' Annuity Fund were defined as "covered retirement systems" within the meaning of the Adjustment Act (even though these provisions had been treated as such previously). Consequently, Article III judges were not entitled to reduce, much less eliminate, the effect of Social Security withholding on their salaries. Political appointees and members of Congress, in contrast, received two separate opportunities to do so – one under the Adjustment Act and a second under the Deficit Reduction Act, enacted several months after the 1983 Amendments took effect. The Deficit

Reduction Act allowed the same elections as the Adjustment Act retroactive to January 1, 1984. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494, 1059-60 (1984). *See* Lynn Decl. ¶¶ 21-31, J.A. at 113-16. In 1986, Congress established a new Federal Employees Retirement System – "FERS" – which combined Social Security with a basic benefit and an optional savings plan. Federal Employees Retirement System Act of 1986 ("FERS Act"), Pub. L. No. 99-335, 100 Stat. 514.[6]

Under the FERS Act, the same group of existing employees added mandatorily to Social Security on January 1, 1984, that had been given the opportunity to make elections under the Adjustment Act and the Deficit Reduction Act was once again given a choice of several retirement options. FERS Act § 301(b), 100 Stat. 514, 599-600, 5 U.S.C. § 8331 note. These choices once again permitted the eligible employees to offset the economic effect of the added Social Security withholding. As before, however, Article III judges were not eligible to make any elections to reduce the amount withheld from their salaries as a result of the imposition of Social Security deductions. Lynn Decl. ¶¶ 32-40, J.A. 117-19.

4. On December 29, 1989, the judges initiated this action by filing a complaint in what was then the United States Claims Court. The complaint alleged, *inter alia*, that the Social Security Amendments unconstitutionally diminished their compensation and unconstitutionally discriminated against federal judges. On November 9,

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[6] While participants in CSRS were given the option to join FERS, FERS Act § 301(a), 100 Stat. 599, 5 U.S.C. § 8331 note, at 990-91, only four percent chose to do so. Jt. Stip. ¶ 26, J.A. at 97. As a result, even with the turnover in federal employees that had occurred since 1984, the majority of civilian federal employees were not subject to Social Security as of September 1991. Jt. Stip. at ¶ 23, J.A. at 97.

1990, the Claims Court (Turner, J.) dismissed the judges' complaint for lack of subject matter jurisdiction ("*Hatter I*"). Pet. App. 17a-18a. On appeal, the Federal Circuit reversed and remanded the case for a hearing on the merits of the judges' damages action ("*Hatter II*"). *Id.* at 28a-29a.

5. On remand, the parties conducted discovery and filed cross-motions for summary judgment. On June 22, 1994, the Court of Federal Claims granted the defendant's motion for summary judgment ("*Hatter III*"). *Id.* at 53a. The court held that while "direct" diminutions (*i.e.*, reductions in statutory salaries) are always unconstitutional, regardless of purpose or effect, an "indirect" diminution (*i.e.*, the imposition of a new tax) is unconstitutional only if a judge can demonstrate that it is the product of "legislative intent to influence the judiciary," a showing that the judges in this case did not make. *Id.* at 38a. In addition, while the court acknowledged that the elections afforded other federal employees meant that, unlike the judges, they suffered "no change in take home pay," it found this discriminatory treatment constitutional because there was no showing that Congress' action was motivated by an intent to influence the judiciary. *Id.* at 49a-50a.

6. On August 30, 1995, the Federal Circuit reversed, holding that the Social Security Amendments unconstitutionally diminish the compensation of Article III judges who took office prior to the enactment of the Amendments ("*Hatter IV*"). *Id.* at 66a. The court found that, in order to ensure judicial independence and attract good and competent individuals to the bench, "the Framers adopted an unrestricted protection for judicial compensation." *Id.* at 56a-58a. The court held that *Evans v. Gore*, 253 U.S. 245 (1920), controlled the case, and that where federal law did not charge plaintiffs with the duty of paying

the tax in question when they first assumed office (as in *Evans*), the subsequent imposition of the tax impermissibly reduced their salaries. Pet. App. at 59a. *O'Malley v. Woodrough*, 307 U.S. 277 (1939), did not affect the analysis, since the claimant judge in that case had taken office after Congress had made the taxes in question applicable to judges' salaries; thus, the "judicial claimants had suffered no diminishment in compensation after taking office." Pet. App. at 60a. The court did not reach the judges' independent contentions that the statutes at issue discriminated against judges. The court remanded the case for calculation of the amounts owed the judges in damages.

7. The government petitioned for certiorari, asking this Court to determine whether the imposition of Social Security taxes on sitting Article III judges violated the Compensation Clause. The government raised the question whether "some members of this Court are disqualified from hearing" the case, but argued, *inter alia*, that "the substantial increase in judicial salaries" that had been granted to all judges since the imposition of the taxes "would appear to have offset any purported 'diminution' in compensation" caused by the Social Security Amendments. Petition for a Writ of Certiorari at 25 n.12, *United States v. Hatter*, No. 95-1733 ("Prior Pet.").

On October 7, 1996, finding that it lacked a quorum and that a majority of the qualified Justices "are of the opinion that the case cannot be heard and determined at the next Term of the Court," the Court issued an order stating that the court of appeals' "judgment is affirmed under 28 U.S.C. § 2109 . . . with the same effect as upon affirmance by an equally divided Court" ("*Hatter V*"). Pet. App. at 69a.

8. On remand, the judges submitted undisputed evidence of the amounts unlawfully withheld from their salaries, which ranged from approximately $20,000 to $56,000. The amounts varied because each judge sought damages for the six-year statute of limitations period that preceded his or her joining the original complaint. Notwithstanding its repeated acknowledgements that the continuing nature of the judges' claims would entitle them to this relief, *see* Prior Pet. at 25 n.12, the government argued for the first time in its reply brief that any judge whose claim was filed more than six years after the *enactment* of the Social Security Amendments was barred from any recovery by the statute of limitations.

The trial court agreed, and then found that the remaining judges' claims for diminished compensation were limited to one month (December 1983) because the diminution suffered by those judges in the months and years that followed were "cured" by salary increases that were granted to all Article III judges (and other federal employees) beginning January 1, 1984 ("*Hatter VI*"). *Id.* at 82a. Thus, the trial court held that eight of the sixteen judges were entitled to no recovery, while the other eight were entitled to either $328.95, plus interest (for district court judges) or $347.85, plus interest (for court of appeals judges). *Id.* at 110a-111a.

A panel of the Federal Circuit reversed the trial court's conclusion that the general salary increases granted to all Article III judges (and other federal employees) "cured" the diminution in compensation suffered by those judges who accepted their appointments prior to the enactment of the Social Security Amendments in 1983 ("*Hatter VII*"). *Id.* at 125a. The panel found that "everything in the record and legislative history makes

clear that these [salary] increases" were provided to offset the effects of inflation. *Id.* at 124a. Because the affected judges would have received the general increases regardless of whether their salaries had been diminished, "using [those increases] to offset the losses they incurred from the government's earlier wrongful act" would "deprive the pre-1983 judges of the benefit of those increases," and defeat "Congress'[ ] purposes in granting the increases." *Id.* at 125a. The panel, however, agreed with the trial court that the judges' claims were not "continuing" claims and therefore, held that many of those claims were time-barred. *Id.* at 126a.

Both the judges and the government petitioned for rehearing and rehearing *en banc*. The court denied the government's petition, but granted the judges' petition to rehear *en banc* the panel's decision with respect to the statute of limitations issue. In an opinion by Judge Plager, the author of the panel opinion, the *en banc* court unanimously reversed the panel's decision on the statute of limitations question (and reinstated the panel's opinion with respect to the other issues). *Id.* at 2a. The full court held that, under long-established precedent, the judges' claims "fall[ ] comfortably on the side of the line governed by the continuing claim doctrine." *Id.* at 11a.

REASONS FOR DENYING THE WRIT

As a threshold matter, the Court must consider whether a quorum exists to hear this case. When last before this Court, four Justices recused themselves from this case. The government urges at least some of these Justices to rescind these recusals but offers no authority for the proposition that once recused, a Justice may again consider his or her recusal, particularly to consider whether a lower court judgment that had been affirmed should now be reversed. Moreover, the authority the

government offers to invoke the Rule of Necessity as an alternative source of a quorum is inapposite.

Should the Court conclude that a quorum is available, it should deny further review for three reasons. First, in respect to questions addressed in *Hatter IV*, this Court's order affirming the *Hatter IV* judgment should foreclose further dispute between the parties. Moreover, *Hatter IV* correctly held that the diminution in judicial compensation at issue here falls within the proscriptions of the Compensation Clause. Second, in respect to *Hatter VII*, the unanimous, *en banc* court of appeals' opinion merely and correctly applied longstanding principles of remedies to arrive at damages for the diminution found in *Hatter IV*. Finally, both decisions have limited precedential implications. The only effect of denying the petition will be to permit a limited class of Article III judges to recover damages for an unusual, yet plainly unconstitutional, diminution in their judicial compensation.

I. WHETHER A QUORUM IS AVAILABLE TO HEAR AND DECIDE THIS CASE

1. The petition correctly notes that "[t]here is a threshold question whether a quorum of the Court is available to hear and decide this case." Pet. at 16. When the government petitioned for review of precisely the same question in 1996, it observed that a Justice who may benefit from the outcome of this case "arguably would have 'a financial interest in the subject matter in controversy,' that would require disqualification under 28 U.S.C. § 455(b)(4)." Prior Pet. at 25 n.12. Four Justices recused themselves, and this Court therefore lacked the necessary quorum of six Justices under 28 U.S.C. § 1. Pet. App. 69a. In view of the lack of a quorum, the Court entered an order under 28 U.S.C. § 2109 affirming the decision of the Federal Circuit in *Hatter IV*. *Id.*

Now, the government argues that by reason of the passage of time, the "circumstances that previously indicated recusal may no longer be present" and that, therefore, one or more Justices who recused themselves may nevertheless hear this case. Pet. at 19. The government assumes that a judge or Justice who has been recused from a case can thereafter have substantive involvement. The government, however, provides no legal authority for its assumption. Nor are we aware of any such authority.

We know of no prior occasion on which a federal judge or Justice, once having recused himself or herself, thereafter rescinded the prior recusal and decided to hear a case. Implying a contrary rule, several courts of appeals have held that, upon complete recusal in a case, a judge may exercise no further authority in it other than to issue ministerial orders. *E.g.*, *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 457-58 (5th Cir. 1996); *El Fenix de Puerto Rico v. M/Y Johanny*, 36 F.3d 136, 141-42 (1st Cir. 1994); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988); *see also* 13A Charles Alan Wright, *et al.*, *Federal Practice and Procedure*, § 3550, at 629 (2d ed. 1984).

Nothing in the recusal statute, 28 U.S.C. § 455, suggests that a judge or Justice may revisit and rescind a prior recusal determination. Section 455 was extensively amended in 1974 based upon considerable input from the bench and organized bar. *See* H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352-53. The 1974 amendments specify in far greater detail than had previously been the case the specific grounds which require a judge or Justice to recuse himself. *Compare* 28 U.S.C. § 455(b) *with* 28 U.S.C. § 455 (1970); *see also Liteky v. United States*, 510 U.S. 540, 546-48 (1994) (discussing section 455's legislative history). Despite this added detail, the statute contains no mention of circumstances that

would permit a judge or Justice to rescind his or her recusal.[7]

2. The government argues in the alternative, as it did in its prior petition, that the Rule of Necessity permits the entire Court to hear and decide the case. Although the petition cites *United States v. Will*, 449 U.S. 200 (1980), Pet. at 17, that case makes clear that the Rule of Necessity applies only if "*all* Article III judges have an interest in the outcome." 449 U.S. at 212 (emphasis added). When all judges are interested, interested judges must hear the case lest "litigants . . . be denied their right to a forum." *Id.* at 217.

However, disinterested judges were available to hear all questions in this case at both the trial and appellate levels. The litigants' interests in the availability of a forum have been fully satisfied by the adjudications already rendered. As was the case when the government raised this argument in its prior petition, the Rule of Necessity is simply inapposite.[8]

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[7] Section 455(f) does provide that a judge or Justice may continue to hear a case notwithstanding discovery of a financial interest that would otherwise disqualify the judge or Justice if the judge or Justice divests the interest. 28 U.S.C. § 455(f). However, Congress carefully limited this exception to a circumstance in which the judge or Justice learns of the financial interest "after substantial judicial time has been devoted to the matter." *Id.* A decision by a Justice to rescind his or her earlier recusal in this case may be deemed authority for lower court judges to rescind their recusals beyond the limited circumstance permitted by section 455(f), even though substantial judicial time has *not* been devoted to the matter.

[8] The government finds it "noteworthy" that the entire Court heard and decided its pre-1940 Compensation Clause cases. Pet. at 17. Prior to 1948, however, the judicial disqualification statute in effect, then codified at 28 U.S.C. § 24, applied only to district court judges, not circuit court judges or Justices of this Court.

The government, in short, offers no justification why a Justice of this Court should take the extraordinary step of rescinding his or her recusal from this matter. That the existence of a quorum turns on this issue is of no moment. Congress expressly provided for the possibility that disqualifications might deprive the Court of a quorum in a particular case. As with the government's prior petition, in the absence of a quorum, 28 U.S.C. § 2109 provides that "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

II. THE FINAL DETERMINATION OF LIABILITY IN *HATTER IV* SHOULD NOT BE REVIEWED

1. The "law of the case" doctrine strongly counsels against a plenary review of the liability issues addressed in *Hatter IV* and affirmed by this Court in *Hatter V*. Law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). To be sure, the "[l]aw of the case doctrine . . . 'directs a court's discretion, it does not limit the tribunal's power.' " Pet. at 20 (quoting *Arizona*, 460 U.S. at 618); *see Messenger v. Anderson*, 225 U.S. 436, 444 (1912). But this Court has emphasized that "as a rule courts should be loathe to [revisit prior decisions] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona*, 460 U.S. at 618 n.8).

The government contends that the policies supporting the law of the case doctrine do not apply here because this Court did not "examine the merits" of the liability

issue. Pet. at 20. This Court's precedents, however, treat an affirmance by an equally divided court as having precisely the same legal effect – as between the parties to the case – as an affirmance following plenary review. In *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107 (1868), the Court refused to revisit an earlier affirmance by an equally divided Court. *Durant* arose when the party who had lost in the first case initiated a second action raising the same issues. The Court explained that the word "affirmance" is simply "the most convenient mode of expressing the fact that the cause is *finally disposed of.*" *Id.* at 112 (emphasis added). The absence of an opinion prevents the decision from becoming precedent, "[b]ut the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." *Id.* at 113. *See also United States v. Pink*, 315 U.S. 203, 216 (1942), (an affirmance by an equally divided Court is "conclusive and binding upon the parties *as respects that controversy.*") (emphasis added).[9] To permit re-litigation of issues that have been finally decided as between the parties would, as this case illustrates, subject both courts and parties to the "burdens of repeated reargument by indefatigable diehards." 18 Charles Alan Wright, *et al., Federal Practice and Procedure* § 4478, at 790 (1984).

Moreover, in this case, it is the Court's reconsideration of the liability issues that would result in a manifest injustice. The Administrative Office of the U.S. Courts since 1996 has provided all of the affected judges the option to end Social Security deductions. We understand

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[9] While the Court did revisit in a later habeas corpus proceeding an affirmance by an equally divided Court rendered upon a direct appeal of a criminal conviction, *Neil v. Biggers*, 409 U.S. 188 (1972), it did so because of "the peculiarities of federal court jurisdiction" in the habeas corpus context. *Id.* at 190.

that over the past four years a significant number of judges have directed the Administrative Office to stop HI and OASDI deductions. Thus, both the agency administering the court system and individual judges have taken action in reasonable reliance on *Hatter V*; it would be unjust to revisit that determination at this late date.

2. There is no dispute that the Social Security Amendments, in fact, diminished the compensation of the pre-enactment Article III judges. The question addressed by the court of appeals in *Hatter IV*, is whether this diminution falls outside the proscriptions of the Compensation Clause. As the history and purpose of the Compensation Clause and long-standing precedent make clear, the answer to this question is no.

a. The purpose of Article III, Section 1 of the Constitution is to ensure that the judicial branch is both competent and independent. *Will*, 449 U.S. 200 at 217-18. By prohibiting the executive and legislative branches from exercising "control over the tenure and compensation of judges," Article III, Section 1 guarantees that the judiciary is "truly independent" and "free of improper influence from other forces within government." *Will*, 449 U.S. at 218. The guarantees of Article III also serve to increase the stature and competence of the federal judiciary by ensuring a prospective judge that "in abandoning private practice – more often than not more lucrative than the bench – the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhance[d] the quality of justice." *Will*, 449 U.S. at 221 (citing *Evans*, 253 U.S. at 253; 1 J. Kent, *Commentaries on American Law* 276 (1826)).

b. In *Hatter IV*, the court of appeals correctly concluded that the statutes at issue diminish compensation in a manner that is inconsistent with both the language

and the purpose of Article III, Section 1. Because the Framers "considered judicial independence a core value of the Constitution," they "adopted a broad protection for it." Pet. App. 63a. The Compensation Clause, as this Court observed in *Evans*, "contains no excepting words and appears to be directed against all diminution, whether for one purpose or another." 253 U.S. at 255. The language of the Clause thus plainly encompasses diminutions that result from the imposition of taxes on the compensation of *sitting* Article III judges. This is the central holding of *Evans*. As the court of appeals explained, the holding in *Evans* follows ineluctably from the purposes of the Clause. Pet. App. 59a. The imposition of a new tax on the compensation of sitting Article III judges threatens both the independence and competence of the judicial branch in exactly the same manner as a diminution in the statutory salary. Both diminutions "withhold or take from the judge a part of that which has been promised by law for his services." *Evans*, 253 U.S. at 254.[10]

Evans' focus on the compensation of *sitting* judges was blurred in *Miles v. Graham*, 268 U.S. 501, 509 (1925), when the Court held that the Compensation Clause prohibited the imposition of a general federal income tax law on judges who assumed office *after* the tax became law. In reaching this conclusion, the Court relied on *Evans*, which

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[10] The same cannot be said with respect to judges who are appointed after the tax at issue is enacted. First, when a tax has been imposed on judicial compensation before a judge takes office, there is, by definition, no diminution in compensation during the judge's "continuance in office." U.S. CONST. art. III, § 1. Second, in these circumstances, there is no threat to judicial independence or competence; as the court of appeals explained, the tax is simply "a pre-existing obligation factored into the new judges' compensation." Pet. App. 60a.

contained reasoning that was far broader than necessary to support its central holding. *See* Pet. at 22. Indeed, as this Court observed in *Will*, the broad rationale of *Evans* suggests that the Compensation Clause "erect[s] an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges." 449 U.S. at 227.

The Court criticized the broad rationale of *Evans*, and expressly overruled the holding of *Miles*, in *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939). Like *Miles*, *O'Malley* involved a challenge to a federal income tax statute by a judge who was appointed to the court of appeals after the tax in question was enacted. The Court held that it would "trivialize the great historic experience on which the framers based the safeguards of Article III, § 1" to hold that "a non-discriminatory tax laid generally on net income" threatens "the independence of judges *who took office after Congress*" enacted the tax. *Id.* at 281-82 (emphasis added).

O'Malley criticized the broad reasoning of *Evans*,[11] but it did not overrule the holding of that case. *Id.* Nor did *Will*. 449 U.S. at 227. The lower courts, including the court of appeals here, have had no difficulty understanding that "in overruling *Miles v. Graham* and leaving *Evans*

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[11] The commentators at the time focused their criticism on the *Evans* Court's use of the intergovernmental tax immunity doctrine, which, as the government notes, has since been disapproved. Pet. at 24-25. They did not, by and large, criticize the holding of *Evans*. Moreover, contrary to the statement in *O'Malley* that *Evans* "was rejected by most of the courts before whom the matter came after that decision," 307 U.S. at 281, the fact is that many states have adopted the *Evans* rule as a matter of state constitutional law. *See Gordy v. Dennis*, 5 A.2d 69, 82 (Md. 1939); *In re Opinions of the Justices*, 144 So. 111 (Ala. 1932); *Long v. Watts*, 110 S.E. 765 (N.C. 1922).

v. Gore standing, [the Court] obviously meant to let the decision in the latter case rest upon its own facts." *Baker v. Commissioner*, 149 F.2d 342, 343 (4th Cir.), *cert. denied*, 326 U.S. 746 (1945).

3. This case illustrates why the central holding of *Evans* should not, as the government urges, be reversed. When the judges in this case were appointed to the bench, each compared his compensation in private life, which already reflected Social Security withholding, to his prospective compensation as a judge, which included no diminution for Social Security withholding. Declarations of Judges, J.A. at 26-90. Based on a comparison of these two amounts, each judge accepted his appointment. *Id.* The Social Security Amendments significantly and adversely altered this economic calculus: they not only diminished the judges' compensation, but they did so in a way that made the judicial office *relatively* less attractive. In other words, the statutes affected only one side of the economic scale on which the judge weighed his decision to accept appointment to the bench. Congress expressly recognized this fact, observing that individuals holding "lifetime judicial appointments" when these amendments were passed had no way to avoid the diminution in compensation "other than to resign." *See supra* p.7.

The effect of the Social Security Amendments, in short, is no different in constitutional terms than a reduction in the statutory salaries of Article III judges or, indeed, the imposition of a tax solely on the salaries of Article III judges. Each diminishes the compensation that was promised to sitting judges when they decided to accept their appointments to the bench, and thereby encourages them to return to private life. As the court of appeals recognized, this is precisely the sort of economic threat to judicial independence and competence that the Compensation Clause was designed to prevent.

The government contends that a diminution in compensation that results from the imposition of a tax on sitting Article III judges can never pose "a threat to the constitutional value of judicial independence," at least in the absence of a showing that "Congress intended to undermine the independence of federal judges." Pet. 25-26 n.25. The mechanism the Framers chose to protect judicial independence and competence does not, however, distinguish among diminutions based on Congress' intent; it is a broad prohibition on any diminution in judicial compensation. Thus, in *Will*, this Court struck down Congress' rescission of certain cost-of-living increases for judges even though there was no argument that the rescissions in question were "intended to undermine the independence of federal judges." Pet. at 26 n.25. *See also* 15 James Wm. Moore, *Moore's Federal Practice* ¶ 100.05[4][a-b] (Matthew Bender 3d ed. 1999) (rejecting the contention that the Compensation Clause reaches only those diminutions that "actually threaten judicial independence," explaining that "the difficulty and awkwardness of engaging in this equitable inquiry lies behind the practice of separation of powers in general. In any event, the text of Article III does not permit such a course.")

The irony of the government's position is that if Congress truly wished to attack the independence of Article III judges by diminishing their compensation, what better way to accomplish this end than by extending to them a tax from which they were previously exempt. After all, a reduction in statutory salaries would not survive judicial challenge in light of *Will*; nor, in all likelihood, would a tax levied solely on the salaries of Article III judges. The extension of a tax from which judges had been previously exempt (in this case, exempt for approximately 50 years), however, would achieve two

ends: it would make the judicial office relatively less attractive to those already holding it, while simultaneously preserving the appearance of legislative even-handedness.

4. *Hatter IV* is independently sustainable on the ground that the statutes at issue in this case diminished judicial compensation in a discriminatory manner. Although a showing of discrimination is not necessary to prove a violation of the Compensation Clause, *see Will*, 449 U.S. at 226 (the Clause "makes no exceptions for 'non-discriminatory' reductions"), there is no dispute that the Compensation Clause prohibits a statute that imposes a different and greater economic burden on Article III judges. *See O'Malley*, 307 U.S. at 282. Although the Federal Circuit did not reach the issue, the stipulated facts of record demonstrate that the Social Security Amendments and subsequent legislation diminished the compensation of sitting Article III judges in a discriminatory manner.

a. The Social Security Amendments discriminated against Article III judges in that they imposed on those judges a new tax burden that was not borne by millions of working Americans. According to stipulated Social Security Administration data, 17.1 percent of the labor force (excluding the Armed Forces) was *not* subject to Social Security deductions as of December 1983, a figure which declined to 14.1 percent (*i.e.*, approximately 8 million employees) a year after adoption of the 1983 Amendments. Jt. Stip. ¶¶ 18, 27, Table 4, J.A. at 95-96, 98, 100. Thus, unlike the income tax statutes at issue in *Evans* and *O'Malley*, Social Security taxes are not a duty that judges "share[ ] with all other[ ] [citizens]." *Evans*, 253 U.S. at 265 (Holmes, J., dissenting).

b. The statutes at issue also discriminated against sitting Article III judges in comparison to other federal employees. From the establishment of the Social Security

system until the adoption of the 1983 Amendments, relatively few employees of the United States Government were covered by OASDI because old age, survivors, and disability benefits were already provided to these employees under existing publicly-financed systems established by Congress. Likewise, as the government acknowledges, Article III judges were excluded because "judges were (and are) entitled to retire . . . and to receive lifetime annuities equal to their salary at the time of retirement" as provided in 28 U.S.C. § 371. Pet. at 3. According to Office of Personnel Management (OPM) estimates, 2,503,914 civilian federal employees (or 92.4 percent of all such employees) were not subject to Social Security as of September 1983. Jt. Stip. ¶ 19, J.A. at 96.

The 1983 Amendments did not require OASDI coverage for the overwhelming majority of federal employees who, like the plaintiffs, were hired before 1984. Although pre-1984 federal employees were eligible to transfer to the new FERS system, which would subject them to Social Security coverage and withholding, an overwhelming 96 percent of eligible pre-1984 federal employees opted to retain their old non-Social Security retirement system. *Id.* ¶ 26, J.A. at 97. To deny this option to Article III judges was discrimination.

c. In a series of statutes – the Adjustment Act, the Deficit Reduction Act and the FERS Act – Congress repeatedly discriminated against federal judges, denying them financial benefits and elections that it granted to other federal employees, including those mandatorily included in Social Security under the 1983 Amendments. As a result, federal judges *alone* had no choice but to bear the full economic effect of having OASDI taxes withheld

from their compensation. *See* Lynn Decl. ¶¶ 16, 27-40, J.A. at 111-12, 115-19.[12]

The taxes imposed on sitting federal judges by the statutes at issue in this case are not, in short, taxes "of general, non-discriminatory application to all earners of income." *O'Malley*, 307 U.S. at 280. Millions of working Americans were exempt from these taxes in 1983 and remain exempt today. Moreover, in extending these taxes to Article III judges, Congress did so in a manner that imposed a far greater economic burden on the judges than on any other federal employees. This discrimination renders the statutes at issue here unconstitutional under the Compensation Clause.

III. THE *HATTER VII* DECISION IS CLEARLY CORRECT, IS IN HARMONY WITH THIS COURT'S PRECEDENTS, AND DOES NOT MERIT FURTHER REVIEW

The government challenges the Federal Circuit's holding that the unconstitutional diminutions of compensation caused by the imposition of HI and OASDI taxes on sitting Article III judges were not remedied by subsequent salary increases. Pet. at 26-29. This challenge, however, ignores the Federal Circuit's central finding and, in

[12] The government has sought to justify the discriminatory treatment of federal judges under these statutes on the ground that federal judges, unlike other federal employees, were not required to "pay" for a statutory retirement system. While Article III judges do not "pay" in the form of payroll withholding for the salary or annuity to which they become entitled upon retirement from active service, they do pay for that retirement entitlement by accepting a relatively low annual salary while in active service.

so doing, elevates a simple matter of statutory interpretation into a more difficult (and unnecessary) issue of constitutional interpretation.

1. It is undisputed that all of the salary increases that Article III judges have received from Congress during the period relevant to this case were given to broad segments of the federal workforce to remedy the effects of inflation on federal salaries. The Federal Circuit was, therefore, clearly correct when it concluded that:

> In the general salary increases Congress has seen fit to grant the judiciary in the years since 1983, there is nothing to suggest that the congressional purpose was to make whole the losses sustained by the pre-1983 judges resulting from the unconstitutional imposition of the tax at issue in this case. On the contrary, everything in the record and the legislative history makes clear that these increases were in response to continued concerns expressed in Congress, within the judiciary itself, in the bar, as well as among segments of the informed public, concerns for the wellbeing and continued vitality of the federal judiciary if the slide in purchasing power resulting from continued and unadjusted-for inflation was not halted.

Pet. App. 124a (footnote omitted).

Since the relevant salary increases had no stated purpose other than to compensate judges (and many other federal employees) for the effects of inflation on their purchasing power, the difficult constitutional questions being raised by the government as to whether and to what extent subsequent salary increases can remedy past unconstitutional diminutions are not presented in this case and should not be decided. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). ("If a

case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")

2. The government contends that any salary increase paid to judges, regardless of its stated purpose or clear effect, will cure an unconstitutional diminution so long as it exceeds the amount of the initial diminution. This is plainly wrong. Consider the following example: Assume that shortly before a general increase of $25,000 in the salaries of all circuit judges, Congress lowers the salaries of D.C. Circuit judges by $24,000 because of congressional displeasure with recent decisions of that Court. According to the government, D.C. Circuit judges would have no claim because the increase would have more than offset the unconstitutional diminution, despite the fact that the D.C. Circuit judges would still be $24,000 worse off than they would have been but for the unconstitutional diminution. Put simply, general salary increases cannot remedy an unconstitutional diminution in the compensation of a group of judges – as both the hypothetical example and the facts of this case show – because in neither circumstance are the plaintiff judges in the same position they would have been in but for the unconstitutional diminution. *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

3. The Federal Circuit's decision in *Hatter VII* is fully consistent with this Court's Compensation Clause precedents. First, on the day after the enactment of the income tax statute challenged in *Evans*, Congress increased judicial compensation of district court judges and circuit court judges by amounts far in excess of the amounts the judges owed under the income tax statute. *See* Act of February 24, 1919, ch. 18, 40 Stat. 1057 (tax statute); Act of February 25, 1919, ch. 29, 40 Stat. 1156 (increasing compensation of district judges from $6,000 to

$7,500 and of circuit judges from $7,500 to $8,500). Under the government's reasoning, judges appointed prior to the enactment of the income tax statute should have begun to pay income taxes on their salaries as soon as these increases went into effect on March 1, 1919. Yet, they did not.[13]

Secondly, in *United States v. Will*, 449 U.S. 200 (1980), the Supreme Court considered the constitutionality of Congress' repeal of judicial salary increases in four separate years. With respect to "Year 1," the plaintiff judges sought (and were awarded) relief only for the period October 1, 1976 (the day the diminution in salary occurred), to March 1, 1977 (the day the plaintiffs received an increase pursuant to the quadrennial review that raised their salaries above the pre-diminution levels). The reason why the plaintiffs in *Will* sought no relief after March 1, 1977, is because the salary increase they received on that day placed them in the same (indeed, in a better) position than they would have been in had the challenged diminution in compensation never occurred. Here, in contrast, the effect of the Social Security taxes has been to reduce the plaintiff judges' compensation

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[13] The government asserted below that "it is clear from the material the judges cite . . . that, in the 1920s, it was believed *Evans* effectively banned *any* taxation of judges' compensation." Defendant-Appellee's Opening Brief at 32, *Hatter VII* (emphasis in original). This is incorrect. An Opinion of the Attorney General, issued in the wake of *Evans*, opined that the salaries of judges appointed *after* the enactment of the income tax statute at issue in *Evans* were taxable. 32 Op. Att'y Gen. 248 (1920). It was not until some five years later that the Supreme Court concluded in *Miles* that income taxes could not be applied to Article III judges appointed after the tax was enacted. Thus, at the time of the 1919 salary increase, there was no understanding that "*Evans* effectively banned *any* taxation of judges' compensation."

each year to a level below the compensation they would have received but for the enactment of the challenged statutes.

4. The government's other arguments with respect to the remedial issues are meritless. The Federal Circuit did not state, as the government contends, that a Compensation Clause violation continued despite general judicial salary increases "because . . . a different rule would create two classes of judges." Pet. at 27. The Federal Circuit instead observed that the *government's* position created two classes of judges, one that would enjoy the full benefit of any general salary increases and, a second, that would have to net out its damages from the general salary increases. Pet. App. 122a. The government is also wrong when it charges that the Federal Circuit's ruling creates "two classes of judges with different compensation packages." Pet. at 28. If two classes of judges were created, it was Congress that did so when it diminished judicial compensation in 1983. The potential for judges with differing compensation inheres within a constitutional guarantee that protects only prior-appointed judges from the effects of a lowering of judicial compensation.

IV. THE RULINGS BELOW HAVE LIMITED PRECEDENTIAL AND REMEDIAL IMPLICATIONS

1. The petition suggests that the court of appeals' decisions have significance well beyond the facts of this case, yet in more than 200 years of constitutional interpretation, this is only the second case to raise before this Court the issue of whether the Compensation Clause prohibits the imposition of a new federal tax on sitting Article III judges. Because the court of appeals' decisions affect only those Article III judges who accepted their appointments prior to January 1, 1984, their remedial

implications are of limited scope and duration. Indeed, Congress could readily cure the constitutional defect found in *Hatter IV* in a number of different ways, including giving Article III judges the option whether or not to participate in the Social Security and Medicare programs.

2. The government argues that review is needed because the reasoning of the court of appeals' decisions suggest that "Congress would effectively be required either (a) to freeze the rate of any tax applicable to judicial salaries to the rate in effect when each judge was appointed, or (b) to subject federal judicial salaries only to the lowest income tax rate that was applicable when any sitting member of the judiciary first took office." Pet. at 28 n.26. In the 75 years since *Evans v. Gore* was decided, this claim has never been made, and the court of appeals' decision lends no support to such a claim. The distinction between *O'Malley* and *Evans*, as the court observed, is that a judge who is appointed *after* a tax is enacted accepts the appointment with knowledge that the specified compensation will be subject to the tax. Pet App. 60a. Indeed, in *O'Malley*, the Court emphasized that the income tax statute "gave notice to all judges thereafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes." 307 U.S. at 279. A judge who accepts an appointment subject to a tax necessarily accepts the prospect that the rate of tax may change. Unless a tax rate is changed in a discriminatory manner with respect to Article III judges, the change will apply equally to judicial compensation and private compensation, and will pose no potential threat to judicial independence or competence. The court of appeals' decision does not hold otherwise.

CONCLUSION

If a quorum is unavailable to hear this case, the judgment of the Federal Circuit should be affirmed pursuant to 28 U.S.C. § 2109, or alternatively, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT ACT OF 1983

5 U.S.C. § 8331 note

FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT

Pub. L. 98-168, title II, Nov. 29, 1983, 97 Stat. 1106, as amended Pub. L. 99-190, § 147, Dec. 19, 1985, 99 Stat. 1324; Pub. L. 99-335, title III, §§ 305(a), 309, June 6, 1986, 100 Stat. 606, 607, provided that:

"SHORT TITLE

"Sec. 201. This title may be cited as the 'Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983'.

"STATEMENT OF POLICY

"Sec. 202. It is the policy of the Government–

"(1) that the amount required to be contributed to certain public retirement systems by employees and officers of the Government who are also required to pay employment taxes relating to benefits under title II of the Social Security Act [42 U.S.C. 401 et seq.] for service performed after December 31, 1983, be modified until the date on which such employees and officers are covered by a new Government retirement system (the design, structure, and provisions of which have not been

determined on the date of enactment of this Act [Nov. 29, 1983]), or January 1, 1987, whichever is earlier;

"(2) that the Treasury be required to pay into such retirement systems the remainder of the amount such employees and officers would have contributed during such period but for the temporary modification;

"(3) that the employing agencies make contributions to the retirement systems with respect to such service in amounts required by law in effect before January 1, 1984, without reduction in such amounts;

"(4) that such employees and officers accrue credit for service for the purposes of the public retirement systems in effect on the date of enactment of this Act [Nov. 29, 1983] until a new Government retirement system covering such employees and officers is established;

"(5) that, where appropriate, deposits to the credit of such a retirement system be required with respect to service performed by an employee or officer of the Government during the period described in clause (1), and, where appropriate, annuities be offset by the amount of certain social security benefits attributable to such service; and

"(6) that such employees and officers who are first employed in civilian service by the Government or first take office in civilian service in the Government on or after January 1, 1984, become subject to such new Government retirement system as may be established for employees and officers of the Government on or after January 1, 1984, and before January 1, 1987, with credit for service performed after December 31, 1983, by such employees and officers transferred to such new Government retirement system.

"DEFINITIONS

"Sec. 203. (a) For the purposes of this title–

"(1) the term 'covered employee' means any individual whose service is covered service;

"(2) the term 'covered retirement system' means–

"(A) the Civil Service Retirement and Disability System under subchapter III of chapter 83 of title 5, United States Code;

"(B) the Foreign Service Retirement and Disability System under chapter 8 of the Foreign Service Act of 1980 (22 U.S.C. 4041 et seq.);

"(C) the Central Intelligence, Agency Retirement and Disability System under the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note); and

"(D) any other retirement system (other than a new Government retirement system) under which a covered employee who is a participant in the system is required to make contributions to the system in an amount equal to a portion of the participant's basic pay for covered service, as determined by the President.

"(3) the term 'covered service' means service which is employment for the purposes of title II of the Social Security Act [42 U.S.C. 401 et seq.] and chapter 21 of the Internal Revenue Code of 1986 [26 U.S.C. 3101 et seq.] by reason of the amendments made by section 101 of the Social Security Amendments of 1983 (97 Stat. 67) [amending section 3121 of Title 26, Internal Revenue Code, and sections 409 and 410 of Title 42, The Public Health and Welfare, and enacting provisions set out as

notes under section 3121 of Title 26 and section 410 of Title 42]; and

"(4) the term 'new Government retirement system' means any retirement system which (A) is established for officers or employees of the Government by or pursuant to a law enacted after December 31, 1983, and before January 1, 1987, and (B) takes effect on or before January 1, 1987.

"(b) The President shall publish the determinations made for the purpose of subsection (a)(2)(D) in an Executive order.

"CONTRIBUTION ADJUSTMENTS

"Sec. 204. (a) In the case of a covered employee who is participating in a covered retirement system, an employing agency shall deduct and withhold only 1.3 percent of the basic pay of such employee under–

"(1) section 8334 of title 5, United States Code;

"(2) section 805 of the Foreign Service Act of 1980 (22 U.S.C. 4045);

"(3) section 211 of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note); or

"(4) any provision of any other covered retirement system which requires a participant in the system to make contributions of a portion of the basic pay of the participant;

for covered service which is performed after December 31, 1983, and before the earlier of the effective date of a new Government retirement system or January 1, 1987. Deductions shall be made and withheld as provided by such provisions in the case of covered service which is performed

on or after such effective date or January 1, 1987, as the case may be, and is not subject to a new Government retirement system.

"(b) Employing agencies of the Government shall make contributions with respect to service to which subsection (a) of this section applies under the second sentence of section 8334(a)(1) of title 5, United States Code the second sentence of section 805(a) of the Foreign Service Act of 1980 (22 U.S.C. 4045(a)), the second sentence of section 211(a) of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note), and any provision of any other covered retirement system requiring a contribution by the employing agency, as if subsection (a) of this section had not been enacted.

"REIMBURSEMENT FOR CONTRIBUTION DEFICIENCY

"Sec. 205. (a) For purposes of this section–

"(1) the term 'contribution deficiency', when used with respect to a covered retirement system, means the excess of–

"(A) the total amount which, but for section 204(a) of this Act, would have been deducted and withheld under a provision referred to in such section from the pay of covered employees participating in such retirement system for service to which such section applies, over

"(B) the total amount which was deducted and withheld from the pay of covered employees for such service as provided in section 204(a) of this Act; and

"(2) the term 'appropriate agency head' means–

"(A) the Director of the Office of Personnel Management, with respect to the Civil Service Retirement and Disability System under subchapter III of chapter 83 of title 5, United States Code;

"(B) the Secretary of State, with respect to the Foreign Service Retirement and Disability System under chapter 8 of the Foreign Service Retirement Act of 1980 (22 U.S.C. 404 et seq.) [22 U.S.C. 4041 et seq.];

"(C) the Director of Central Intelligence, with respect to the Central Intelligence Agency Retirement and Disability System under the Central Intelligence Agency Retirement Act (50 U.S.C. 403 note); and

"(D) the officer designated by the President for that purpose in the case of any retirement system described in section 203(a)(2)(D) of this Act.

"(b) At the end of each of fiscal years 1984, 1985, 1986, and 1987 the appropriate agency head–

"(1) shall determine the amount of the contribution deficiency for such fiscal year in the case of each covered retirement system, including the interest that those contributions would have earned had they been credited to the fund established for the payment of benefits under such retirement system in the same manner and at the same time as deductions under the applicable provision of law referred to in section 204(a) of this Act; and

"(2) shall notify the Secretary of the Treasury of the amount of the contribution deficiency in each such case.

"(c) Before closing the accounts for each of fiscal years 1984, 1985, 1986, and 1987, the Secretary of the Treasury shall credit to the fund established for the payment of

benefits under each covered retirement system, as a Government contribution, out of any money in the Treasury not otherwise appropriated, an amount equal to the amount determined under subsection (b) with respect to that covered retirement system for the fiscal year involved.

"(d) Amounts credited to a fund under subsection (c) shall be accounted for separately than amounts credited to such fund under any other provision of law.

"SPECIAL DEPOSIT AND OFFSET RULES RELATING TO RETIREMENT BENEFITS FOR INTERIM COVERED SERVICE

"Sec. 206. (a) For the purposes of this section, the term 'interim covered service' means covered service to which section 204(a) applies.

"(b)(1) Paragraphs (2) and (3) apply according to the provisions thereof only with respect to a covered employee who is employed by the Government on December 31, 1983.

"(2)(A) Notwithstanding any other provision of law, the interim covered service of such covered employee shall be considered–

"(i) in determining entitlement to and computing the amount of any annuity (other than a disability or survivor annuity) commencing under a covered retirement system during the period beginning January 1, 1984, and ending on the earlier of the date a new Government retirement system takes effect or January 1, 1987, by reason of the retirement of such covered employee during such period only if such covered employee makes a deposit to the credit of such covered retirement system for such covered

service in an amount computed as provided in subsection (f); and

"(ii) in computing a disability or survivor annuity which commences under a covered retirement system during such period and is based in any part on such interim covered service.

"(B) Notwithstanding any other provision of law, an annuity to which subparagraph (A)(ii) applies shall be reduced by the portion of the amount of any benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] and is attributable to the interim covered service considered in computing the amount of such annuity, as determined under subsection (g), unless, in the case of a survivor annuity, a covered employee has made a deposit with respect to such covered service for the purposes of subparagraph (A)(i) before the date on which payment of such annuity commences.

"(3) Notwithstanding any other provision of law, if a new Government retirement system is not established or is inapplicable to such a covered employee who retires or dies subject to a covered retirement system after the date on which such new Government retirement system takes effect, the interim covered service of such covered employee shall be considered in determining entitlement to and computing the amount of an annuity under a covered retirement system based on the service of such covered employee only if such covered employee makes a deposit to the credit of such covered retirement system for such covered service in an amount computed as provided in subsection (f).

"(c)(1) Paragraphs (2) and (3) apply according to the provisions thereof only with respect to a covered employee

who was not employed by the Government on December 31, 1983.

"(2) Notwithstanding any other provision of law, any annuity which commences under a covered retirement system during the period described in subsection (b)(2)(A)(i) and is based, in any part, on interim covered service shall be reduced by the portion of the amount of any benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] to the annuitant and is attributable to such service, as determined under subsection (g).

"(3) Notwithstanding any other provision of law, if a new Government retirement system is not established, the interim covered service of such a covered employee who retires or dies after January 1, 1987, shall be considered in determining entitlement to and computing the amount of an annuity under a covered retirement system based on the service of such covered employee only if such covered employee makes a deposit to the credit of such covered retirement system for such covered service in an amount computed as provided in subsection (f).

"(d) If a covered employee with respect to whom subsection (b)(3) or (c)(3) applies dies without having made a deposit pursuant to such subsection, any individual who is entitled to an annuity under a covered retirement system based on the service of such covered employee or who would be entitled to such an annuity if such deposit had been made by the covered employee before death may make such deposit after the date of death of such covered employee. Service covered by a deposit made pursuant to the first sentence shall be considered in determining, in the case of each individual to whom the first sentence applies, the entitlement to and the amount of an annuity under a covered

retirement system based on the service of such covered employee.

"(e) A reduction in annuity under subsection (b)(2)(B) or (c)(2) shall commence on the first day of the first month after the date on which payment of benefits under title II of the Social Security Act [42 U.S.C. 401 et seq.] commence and shall be redetermined each time an increase in such benefits takes effect pursuant to section 215(i) of the Social Security Act [42 U.S.C. 415(i)]. In the case of an annuity of a participant or former participant in a covered retirement system, of a surviving spouse or child of such participant or former participant, or of any other person designated by such participant or former participant to receive an annuity, under a covered retirement system (other than a former spouse) the reduction in annuity under subsection (b)(2)(B) or (c)(2) shall be calculated before any reduction in such annuity provided under such system for the purpose of paying an annuity under such system to any former spouse of such participant or former participant based on the service of such participant or former participant.

"(f) For the purposes of subsection (b) or (c), the amount of a deposit to the credit of the applicable covered retirement system shall be equal to the excess of–

"(1) the total amount which would have been deducted and withheld from the basic pay of the covered employee for the interim covered service under such covered retirement system but for the application of section 204(a), over

"(2) the amount which was deducted and withheld from such basic pay for such interim covered service pursuant to section 204(a) and was not refunded to such covered employee.

"(g) For the purpose of subsections (b)(2)(B) and (c)(2), the portion of the amount of the benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] to an individual and is attributable to interim covered service shall be determined by–

"(1) computing the amount of such benefits including credit for such service;

"(2) computing the amount of such benefits, if any, without including credit for such service; and

"(3) subtracting the amount computed under clause (2) from the amount computed under clause (1).

"(h) The Secretary of Health and Human Services shall furnish to the appropriate agency head (as defined in section 205(a)(2)) such information as such agency head considers necessary to carry out this section.

"TRANSFER OF CREDIT TO NEW RETIREMENT SYSTEM

"Sec. 207 [Repealed. Pub.L. 99-335, Title III, § 309, June 6, 1986, 100 Stat. 607]

"ELECTIONS BY CERTAIN COVERED EMPLOYEES

"Sec. 208. (a) Any individual performing service of a type referred to in clause (i), (ii), (iii), or (iv) of section 210(a)(5) of the Social Security Act [42 U.S.C. 410(a)(5)(i)-(iv)] beginning on or before December 31, 1983, may–

"(1) if such individual is then currently a participant in a covered retirement system, elect by written application submitted before January 1, 1984–

"(A) to terminate participation in such system, effective after December 31, 1983; or

"(B) to remain under such system, as if the preceding sections of this Act and the amendments made by this Act had not been enacted; or

"(2) if such individual is then currently not a participant in a covered retirement system, elect by written application–

"(A) to become a participant under such system (if such individual is otherwise eligible to participate in the system), subject to the preceding sections of this Act and the amendments made by this Act; or

"(B) to become a participant under such system (if such individual is otherwise eligible to participate in the system), as if the preceding sections of this Act and the amendments made by this Act had not been enacted.

"(b) An application by an individual under subsection (a) shall be submitted to the official by whom such covered employee is paid.

"(c) Any individual who elects to terminate participation in a covered retirement system under subsection (a)(1)(A) is entitled to have such individual's contributions to the retirement system refunded, in accordance with applicable provisions of law, as if such individual had separated from service as of the effective date of the election.

"(d) Any individual who is eligible to make an election under subparagraph (A) or (B) of subsection (a)(1), but who does not make an election under either such subparagraph, shall be subject to the preceding sections of this Act and the amendments made by this Act."

[Amendment to section 206(c)(3) of Pub. L. 98-168 by section 305(a)(1) of Pub.L. 99-335 directing the substitution

of "January 1, 1987" for "January 1, 1986" has been executed by substituting "January 1, 1987" for "April 30, 1986" as the probable intent of Congress.]

[Section 305(b) of Pub.L. 99-335 provided that:

"(1) The amendments made by subsection (a) [amending Pub.L. 98-168 set out above] shall be effective as of May 1, 1986.

"(2) Any refund payable to an individual as a result of paragraph (1) shall be paid out of funds of the appropriate retirement system.

"(3) For purposes of this subsection, the term 'retirement system' means a covered retirement system as defined by section 203(a)(2) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1107; 5 U.S.C. 8331 note)."]

APPENDIX B

DEFICIT REDUCTION ACT OF 1984, SECTION 2206

5 U.S.C. § 8331 note

ELECTION OF RETIREMENT PLAN UNDER FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT ACT OF 1983

Pub. L. 98-369, div. B, title II, § 2206, July 18, 1984, 98 Stat. 1059, provided that:

"(a) For the purposes of this section, the term, 'covered retirement system' shall have the same meaning as provided in section 203(a)(2) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (Public Law 98-168; 97 Stat. 1107) [set out below].

"(b)(1) Any individual who was entitled to make an election under section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1111) [set out below], but who did not make such an election, may make an election under such section not later than September 15, 1984.

"(2)(A) Not later than September 15, 1984, any such individual who made an election under paragraph (1) of section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out bleow] may–

"(i) make any other election which such individual was entitled to make under such section before January 1, 1984; or

"(ii) elect to become a participant in a covered retirement system (if such individual is otherwise eligible to participate in such system), subject to sections 201 through 207 of such Act [set out below].

"(B) Not later than September 15, 1984, any such individual who made an election under paragraph (2) of section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 may–

"(i) make any other election which such individual was entitled to make under such section before January 1, 1984; or

"(ii) elect to terminate participation in the covered retirement system with respect to which such individual made the election under such paragraph (2).

"(3) An election under this subsection shall be made by a written application submitted to the official by whom the electing individual is paid.

"(4) An election made as provided in this subsection shall take effect with respect to service performed on or after the first day of the first applicable pay period commencing after September 15, 1984.

"(c)(1) Section 8342(a)(4) of title 5, United States Code, does not apply for the purpose of determining an entitlement to a refund under section 208(c) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1111) [set out below].

"(2) Paragraph (1) shall take effect with respect to any election made under section 208(a) of such Act or this Act before, on, or after January 1, 1984.

"(d) Nothing in this section or the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out below] affects any entitlement to benefits accrued under a covered retirement system before January 1, 1984, except to the extent that any amount refunded under section 208(c) of such Act is not redeposited in the applicable retirement fund."

APPENDIX C

FEDERAL EMPLOYEES' RETIREMENT SYSTEM ACT OF 1986

5 U.S.C. § 8331 note

ELECTION OF COVERAGE UNDER CHAPTER 84

Sections 301 to 303 of Pub.L. 99-335, as amended by Pub. L. 99-556, title III, §§ 301, 302, Oct. 27, 1986, 100 Stat. 3135, 3136; Pub. L. 100-20, § 1(a), April 7, 1987, 101 Stat. 265; Pub. L. 100-238, title I, §§ 106, 107, 113(a)(1), 118, 119, 134(b), (c), Jan. 8, 1988; 101 Stat. 1746, 1747, 1750, 1752, 1764, 1765, provided that:

"SEC. 301. ELECTIONS.

"(a) ELECTIONS FOR INDIVIDUALS SUBJECT TO THE CIVIL SERVICE RETIREMENT SYSTEM.–(1)(A) Any individual (other than an individual under subsection (b)) who, as of June 30, 1987, is employed by the Federal Government, and who is then subject to subchapter III of chapter 83 of title 5, United States Code, may elect to become subject to chapter 84 of such title.

"(B) An election under this paragraph may not be made before July 1, 1987, or after December 31, 1987.

"(2)(A) Any individual who, after June 30, 1987, becomes reemployed by the Federal Government, and who is then subject to subchapter III of chapter 83 of title 5, United States Code, may elect to become subject to chapter 84 of such title.

"(B) An election under this paragraph shall not be effective unless it is made during the six-month period beginning on the date on which reemployment commences.

"(3)(A) Except as provided in subparagraph (B), any individual–

> "(i) who is excluded from the operation of subchapter III of chapter 83 of title 5, United States Code, under subsection (g), (i), (j), or (*l*) of section 8347 of such title, and
>
> "(ii) with respect to whom chapter 84 of title 5, United States Code, does not apply because of section 8402(b)(2) of such title,

shall, for purposes of an election under paragraph (1) or (2), be treated as if such individual were subject to subchapter III of chapter 83 of title 5, United States Code.

"(B) An election under this paragraph may not be made by any individual who would be excluded from the operation of chapter 84 of title 5, United States Code, under section 8402(c) of such title (relating to exclusions based on the temporary or intermittent nature of one's employment).

"(4) A member of the Foreign Service described in section 103(6) of the Foreign Service Act of 1980 [22 U.S.C. 3903(6)] shall be ineligible to make any election under this subsection.

"(b) ELECTIONS FOR CERTAIN INDIVIDUALS SERVING CONTINUOUSLY SINCE DECEMBER 31, 1983.–The following rules shall apply in the case of any individual described in section 8402(b)(1) of title 5, United States Code:

"(1) If, as of December 31, 1986, the individual is subject to subchapter III of chapter 83 of title 5, United States Code, but is not subject to section 204 of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [section 204 of Pub.L. 98-168, set out below], the individual shall remain so subject to such subchapter unless the individual elects, after June 30, 1987, and before January 1, 1988–

> "(A) to become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title [section 8402(b)(2) of this title] who is subject to such subchapter; or
>
> "(B) to become subject to chapter 84 of such title.

An individual eligible to make an election under this paragraph may make the election described in subparagraph (A) or (B), but not both.

"(2) If, as of December 31, 1986, the individual is subject to subchapter III of chapter 83 of title 5, United States Code, and is also subject to section 204 of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out below], the individual–

> "(A) shall, as of January 1, 1987, become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter; and
>
> "(B) may (during the six-month period described in subsection (a)(1)(B)) elect to become subject to chapter 84 of such title.

"(3)(A) If, as of December 31, 1986, the individual is not subject to subchapter III of chapter 83 of title 5, United States Code, such individual may, during the 6-month period described in subsection (a)(1)(B)–

"(i) elect to become subject to chapter 84 of such title; or

"(ii) if such individual has not since made an election described in subparagraph (B), elect to become subject to subchapter III of chapter 83 of such title under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter.

"(B) Nothing in this paragraph shall be considered to preclude the individual from electing to become subject to subchapter III of chapter 83 of such title pursuant to notification under section 8331(2) of such title–

"(i) during the period after December 31, 1986, and before July 1, 1987; or

"(ii) after December 31, 1987, if such individual has not since become subject to subchapter III of chapter 83, or chapter 84, of such title.

"(C) Any individual who becomes subject to subchapter III of chapter 83 of such title pursuant to notification under section 8331(2) of such title after December 31, 1986, shall become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter.

APPENDIX D

DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

28 U.S.C. § 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other

interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as

director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, c. 646, 62 Stat. 908; Dec. 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub. L. 95-598, title I, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub. L. 100-702, title X, § 1007, 102 Stat. 4667.)

APPENDIX E

QUORUM OF SUPREME COURT JUSTICES ABSENT

28 U.S.C.A. § 2109

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

(June 25, 1948, c. 646, 62 Stat. 963.)